No. 80-887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM F. BURNS AND THE RECTOR, WARDENS AND VESTRYMEN OF ST. MARK'S CHURCH IN ORANGE, NEW JERSEY,

Petitioners,

vs.

THE DIOCESE OF NEWARK, THE TRUSTEES OF THE EPISCOPAL FUND AND DIOCESAN PROPERTIES OF THE DIOCESE OF NEWARK, AND THE RIGHT REVEREND GEORGE E. RATH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF ON BEHALF OF PETITIONERS

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Presbyterian Church v. Mary Elizabeth Blue Hull
Presbyterian Church,
393 U.S. 440 (1969) 5

Protestant Episcopal Church, Diocese of N.J.
v. Graves,
83 N.J. 572, 417 A.2d 19 (1980), *petition for cert. filed sub nom.* Moore v. The Protestant Episcopal Church in the Diocese of New Jersey (October 21, 1980) (No. 80-675) 1

Serbian Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) 1, 4, 5

Petitioners have taken the liberty of filing this Reply to the Brief for Respondents in Opposition to Petition for a Writ of Certiorari in order to correct certain serious misstatements made by respondents and to clarify the actual issues which are presented by this case.

Point I

Facts Considered by the Lower Courts.

The issue before the trial court and the New Jersey Supreme Court (after it had opted for the "hierarchical deference" rule) was whether the Episcopal Church exercised an "ultimate power of control more or less complete" over the property affairs of the local parish. There never was any dispute that the Episcopal Church has a hierarchical structure. There was a serious dispute as to the scope of the hierarchy's authority, the resolution of which was "for the court's ultimate decision." *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 725 (1976) (White, J., concurring).

As stated in the New Jersey Supreme Court dissenting opinion, the Diocese failed to identify "any constitutional provisions or canons that address the right of a local parish to withdraw, what happens to its property when that occurs, or who is authorized to resolve a property dispute when a local body secedes." *Protestant Episcopal Church, Diocese of N.J. v. Graves*, 83 N.J. 572, 590, 417 A.2d 19, 29 (1980).[1] On the other hand, the petitioners introduced testimony showing that the Episcopal Church

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1. The "operative facts" cited by respondents at pages 7 and 8 of their brief do not demonstrate, either individually or collectively, that the "rules of polity" of the general church "had placed the ultimate authority over the use of the church property" in the hierarchy. *Jones v. Wolf*, 443 U.S. 595, 618-19 (1979) (Powell, J., dissenting).

never purported to control the property of its affiliated local churches. In particular, the petitioners presented the former official historiographer of both the national Episcopal Church and the diocese of New Jersey, who specifically testified that when St. Mark's reincorporated in 1832 it was clearly contemplated that parishes could disaffiliate and retain their properties (3T7). This testimony was specifically pointed to by the dissenters below. 83 N.J. at 590, 417 A.2d at 29.

It was to rebut this testimony and to present the court with a basis for finding hierarchical control over parish property, that the respondents introduced their own expert testimony. The respondents' expert conceded the absence of express trusts of parish property in favor of the hierarchy, but argued that hierarchical control could be deduced from weaving together various canons and from the interpretations of prayers and rituals.

After quoting extensively from their expert's testimony in both their post-trial brief and in their brief to the Supreme Court of New Jersey, respondents now argue that the New Jersey courts never considered these 134 pages of testimony. Respondents cite no authority for this assertion, nor do they suggest how, in the absence of considering such testimony, hierarchical control over parish property was found to exist by the courts below. Respondents never explain how the majority below could have decided the disputed issues of church law set forth at pages 15 and 16 of the Petition in this case without considering such testimony. Respondents do point to the canon adopted by the General Convention of the Episcopal Church in September of 1979 which created an express trust in favor of the general church. But that canon was enacted *after* the disaffiliation and *after* the trial in this matter.

Contrary to respondents' assertions, the opinions of the trial court and the Supreme Court of New Jersey explicitly show that both courts considered *all* the testimony and evidence offered by respondents at trial. The trial judge concluded that the Episcopal Church was hierarchical for property purposes "[b]ased on the documentary evidence and the testimony. . . ." *Petition for Cert.*, App. B at 13a. Similarly, the New Jersey Supreme Court majority stated that "it has been established that the Protestant Episcopal Church is a completely integrated hierarchical body, the ecclesiastical determination of which incidentally resolves the question of control over local church property." 83 N.J. at 580, 417 A.2d at 24.

Respondents' own brief in opposition to the pending Petition for Certiorari itself ultimately relies upon the *interpretation* of a canon to demonstrate property control. Respondents cite the canon which gives the parish rector the right to the "use and control of the church and parish buildings." Resp. Br. at 11. The rest of the canon, conveniently omitted from respondents' brief, states that the use of such property by the rector is only "for the purposes of his office," *i.e.*, the *spiritual* jurisdiction described in an earlier portion of the canon. The testimony at the trial was in conflict as to just what the canon actually means, particularly in light of another canon which leaves the *property* affairs of a parish to its elected vestry. It was just this type of conflict in testimony as to the meaning of the canons that the dissenters below pointed to in arguing that the inquiry into church doctrine engaged in by the majority in resolving the dispute constituted an "establishment of religion with a vengeance." 83 N.J. at 590, 417 A.2d at 29.

Point II

The Deposing of the Parish Rector.

Respondents point to the fact that petitioner Burns was deposed as parish rector and argue that on the basis of *Serbian Orthodox Diocese v. Milivojevich,* this action is dispositive of the suit. Reliance on *Serbian* is completely misplaced. In that case the issue was the propriety of the defrocking of a bishop in the context of that bishop's seeking to *retain* his office. In the instant case, the parish rector voluntarily disaffiliated from the Episcopal Church and is in no way arguing that he retains his Episcopal Church office. In *Serbian,* it was clear that the occupant of the post of bishop controlled the property. One of the issues in this case is whether the existence of hierarchical power to depose the parish rector from his ecclesiastical office implies the existence of an ultimate power of control more or less complete over the property of the parish. As shown by the conflicting evidence in this case and as argued by the dissenters below, the answer to that question requires the courts to make "a searching and therefore impermissible inquiry into church polity." *Jones v. Wolf,* 443 U.S. at 605.

Point III

Timeliness of the Issue.

Respondents argue that a clarification by this Court of the extent of inquiry into church polity that is permissible for the settlement of church property disputes would somehow "engender uncertainty" and "create chaos." Resp. Br. at 14-15. The simple statement of respondents' argument demonstrates its absurdity.

During a ten-year period commencing in 1969, this Court decided four cases in the church property area, and in so doing set down much-needed constitutional guidance for the resolution of such disputes. *Jones v. Wolf, supra; Serbian Orthodox Diocese v. Milivojevich, supra; Maryland & Virginia Churches of God v. Church of God at Sharpsburg,* 396 U.S. 367 (1970); *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church,* 393 U.S. 440 (1969). Having already devoted so much time to this particular area, it would be a disservice to those lower courts applying the hierarchical deference rule if this Court were not to finish the job by providing the guidelines to be followed by such courts in determining whether or not a general church is hierarchical. The instant case, with its fully-developed record, provides the Court with the appropriate context for the consideration of the appropriate guidelines and limitations.

CONCLUSION

For all of the foregoing reasons and the reasons stated in the Petition for a Writ of Certiorari, this Court should issue a writ of certiorari to review and reverse the judgment and opinion of the Supreme Court of New Jersey.

Respectfully submitted,

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